

DECISIONS RENDERED SATURDAY
FEBRUARY 3, 1884.

Ratteree vs. Morrow. Processions' report, from Clayton. Processioning. Practice in Superior Court. Evidence. Practice in Supreme Court. (Before Judge Hammond.)

Hall, J.—1. Where a protest is filed to the report of processions by the party notified, and on the trial evidence is introduced on both sides, the applicant for the proceeding stands in the place of a plaintiff or movant.

in an ordinary case, and is entitled to open and rebut the argument.

Processioners should have the line around the entire tract of the applicant surveyed and marked; and this must be done in order to make the lines between adjacent owners *prima facie* correct and admissible in evidence without further proof. Where it is apparent on the face of the papers that this has not been done, the action is without legal effect, under the processioning laws. But where only one line was run and marked, and the case was tried in the court below upon an issue as to the correctness of the line so marked, and no objection was made on account of the failure to survey and mark all of the lines, after a verdict finding in favor of the line surveyed and marked, the court below is not bound to set aside the verdict, contrary to law and evidence, on the ground that such failure existed in fact though not apparent on the face of the papers. 69 Ga., 51 (in press).

(a.) The plat of the surveyor and the return of the processioners are both necessary parts of the proceedings, and neither is complete without the other. If, therefore, the court is error to reject the return of the processioners and admit the plat of the surveyor; but this rejection furnishes no ground for reversal on behalf of the party at whose instance it was done. Code, §§2392, 2390, 2386.

(b.) The protest may be amended at any stage of the proceedings. If, at the time that the return of the processioners including the plat showed a failure to ascertain the boundaries of the entire tract and marked them, the court would have no jurisdiction to take further cognizance of the case. Such is not the case here. 69 Ga., 51, 54.

Judgment affirmed.

W. A. WATSON, for defendant.
J. T. SPENCE, for plaintiff in error.

W. L. WATSON, for defendant.

Mullery vs. Hamilton. Money rule, money rule, money rule. Legacies. Evidence. Identity. (Before Judge Hammond.)

H. J. - I. W. of H. legacy had been left to a certain child; and the question was whether he survived the testatrix and whether a certain person who did survive her, and who was claimed to be the legatee was, in fact, so, on the question of identity, it was admissible to show the name such person bore, his personal appearance and conversation with the testatrix, and his standing in his family connections and associations. *Law Lib. Ch. 6; Hubbard, 446, 450, 464, 468 mar. p. 1; Barn. & Ald., 185, 186, 187; Code, 2377.*

(a.) Identity of person may be proved by the concurrence of several characteristics. The tendency of the courts is to be particular in general, more easily disregarded than establish-

2. There was sufficient evidence of the identity of the person claimed to be the legatee and the actual legatee, to uphold the finding in this case.

Judgment affirmed.

W. L. Calhoun, for plaintiff in error.
Collier & Collier, for defendant.

Nunn vs. Georgia Railroad. Case, from DeKalb. Railroads. Damages. Negligence. Contracts. Custom.

Before Judge Hammond.

Hall.—Where a passenger on a railroad train holds a ticket to a given point, it is the duty of the company to stop its train at the point of destination a sufficient length of time to allow the passenger to leave it with safety to his life and person; and if he is carried beyond his stopping place, by no fault of his, the company is liable to the passenger's agent

to do his duty in that behalf, he may recover any damage he may sustain. But it is not necessary to the performance of the ordinary duties of the conductor, in putting passengers off the train, that he should give them any other than the customary warning and opportunity to avail themselves of it. The duty to give the customary warning is a part of a conductor's duty to make a drowsy passenger, and a failure so to do, whereby the passenger was carried beyond his destination furnishes, no cases for recovery along the railroad. *Pierce Am. Ry. Law, 4th Ed.*; 51 *Gr.* 489; 45 *Ind.* 258; 32 *Ill.* 401; 31 *Miss.* 407; 63 *Id.* 14. *Hutch. Car. & C. Co. v. Ry. Co.*, 32 *Pa.* 226, 227 and *note*; 2 *Redf. Am. Ry. Cas.* 536, 540-2; 3 *Am. & Eng. Ry. Cas.* 340. *Distinguish* from *Wood Mast. & Serv.* 32263, 267-8.

(a). How far a custom on the part of a

conductor of assisting uneducated scholars, children or infirm persons, known or which may be presumed to be known to the company, with intent these rules, is not decided. Judgment affirmed.

J. C. Reed, by brief, for plaintiff in error.

Hillyer & Brother; J. B. Cumming, by J. H. Lumpkin, for defendant.

Sole vs. State. Larceny after trust; from Fulton. Criminal Law. Larceny. (Before Judge Hammond.)

Hall, J.—By the Code, §442, two kinds of acts are made criminal; first, where one fraudulently converts to his own use an article entrusted to him, and second, where he otherwise disposes of the article, the injury of the owner is about the same. The law requires him the full value or market price of the article upon demand.

(a). A railroad ticket was entrusted to the

defendant in Fulton county, Georgia, with the right to use a specified portion of the coupons thereto attached, with the distinct engagement that upon reaching Jacksonville, Florida, he would return the coupons to the party who entrusted him therewith. This he failed to do, after repeated demands by telegraph and otherwise. He was brought back to Fulton county, and before the institution of the prosecution, a demand was made upon him for the full value of the coupons and the ticket and coupons. To this he failed to respond.

Held, that there was sufficient to warrant a verdict of guilty of larceny after trust in Fulton county. Code §4142; 15 Ga., 205, 208; 50 Id., 219, 222.

Judgment affirmed.

C. H. Hill, for plaintiff in error.
B. H. Hill, solicitor-general, for brief for defendant.

Hall, J.—1 While no prescribed form is essential to the validity of a deed to land, yet the instrument must be sufficient in itself to show that the intention of the parties was to convey the land. Code, §2692; 32 Ga., 170.

(*) An instrument in the following terms was not a deed, but a contract to convey in the nature of a bond for title:

"Received of Captain G. A. Cooper, sixty-three dollars in part payment of lot fronting on Simpson street, and running back" etc. The balance is one hundred and twelve dollars to be paid, commencing January 23, '75, in monthly installments, as may be agreed in drinks approximating ten dollars." This was signed in presence of witnesses, one of whom gave a justice of the peace.

the agreement, if Captain Cooper should fail to meet the terms of the agreement, the property reverts to Elyea, the maker or heirs, on returning money and legal interest from the date of payments."

Where land had been sold, a part of the purchase money paid, a bond for the purchase money, and a note of the purchase money, and the balance of the purchase money paid for the balance, the title remaining in the vendor when a judgment against him was recovered, was subject to levy and sale under the f. fa. issued thereon. Code, 23582; 18 Ga. 678, 817.

18. Semble, that the purchaser under the vendee's mortgage just so much interest, as the mortgagee would have received, if the defendant in execution had at the date of the judgment. Not decided because question is not before the court.

Judgment affirmed.

Candler, Thomson & Candler, for plaintiff in error.
Collier & Collier, for defendant.

Schmidtapp & Co., vs. La Confiance Insurance Co. Garnishment, from Fulton. Jurisdiction. Insurance. Corporations. Principal and Agent. Garnishment. (Before Judge Hammond.)

Hall, J.—A foreign insurance company did business in South Carolina and Florida, but not in Georgia, and had no agency in the latter state. An agent of the company resided in Georgia, who audited and approved claims arising in South Carolina and Florida, gave checks for amounts due on account thereof, and when in funds, sometimes paid the same.

Held, that the courts of Georgia had no jurisdiction of the company; and upon the facts before stated a garnishment served upon the

gent residing in this state was properly discharged. Code, §§ 3281, 3369, 2850 (a), 850 (j), 3,850 (h), 3,850 (j); 45 Ga., 351; 60 Ia., 310 and cit.

Judgment affirmed.

W. J. Heyward, for plaintiff in error.

A. C. King; J. C. Reed, for defendant.

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rice, surviving partner vs. Caudle. Complainant, from City Court of Atlanta Damages. Master and Servant. Contracts. Amendment. (Before Judge Hall, J.)

Hall, J.—I. In a suit for compensation, growing out of the breach of a contract under which the plaintiff claimed the exclusive right to sell certain goods at a given price in designated territory, and in violation of which others were employed to do the work without his consent, when he was ready and

damages would be the difference between the cost of doing the work and the price to be paid for it; that is, the profits of the enterprise after deducting the legitimate and actual costs of its execution. 42 Ga., 463.

2. The amendment which the court allowed to plaintiff's declaration introduced no new cause of action; nor did it amount to a misjoinder of causes of action.

Judgment reversed.

B. F. Abbott, for plaintiff in error.

D. N. Martin, for defendant.

Low, trustee vs. Holbrook, trustee. Injunction, from Fulton. Trustee. Trespass. Injunction. (Before Judge Hammond.)

Hall, J.—The unauthorized use of the premises of another in putting trash, filth and garbage upon the same, in such a manner

to interfere constantly with their reasonable and unimpeded use by the owner, and to cause a great hurt, annoyance and damage, in addition to being a nuisance, is a continuing trespass, which may be irreparable in damages; and whether the wrong-doer is involved or not, these repeated acts may give rise to a multiplicity of suits. To avoid these consequences, or for other reasons which may be shown, the court may interpose by injunction. Code, §3002,3219.

(a.) That one of two joint owners permitted party wall to be erected with certain windows left open in it, was not alone sufficient to show that he licensed the wrongful use of such windows to his injury, or estop him from removing or restraining such wrong and damage.

Judgment affirmed.

W. L. Heyward; B. B. Redwine, for plaintiff in error.

fasland, Jr., vs. Kemp et al. Refusal of injunction, from Dougherty. Injunction. Practice in Superior Court. Res adjudi. cata. (Before Judge Bowser.)

Hall, J. —1. Upon the hearing of an application for injunction in vacation, the only one which could be made of a plea of res adjudi. catio was the evidence it afforded to justify the refusal of the injunction prayed for. The chancellor could pass no order finally disposing of the plea.

2. The bill made no case for an injunction. It did not appear that either of the defendants was insolvent or likely to become so; the undated property sought to be substituted and sold was found to be the commencement of this litigation; and if ever subject to the aim, it still remained so; the pendency of

bill was notice to anyone who might purchase; the defendants denied notice of complainant's equity when they purchased and paid for the property; the answer swore to the equity of the bill, and no rebutting testimony was offered at the hearing. Judgment affirmed.

H. Morgan; W. E. Smith, for plaintiff in error.

R. Hobbs; D. H. Pope, for defendants.

Pike vs. Hood. Distress warrant, from the sheriff of the county of Harrison, to the sheriff of the county of St. Louis, for the arrest of the defendant, before Judge Harris.

Hall, J.—At the monthly session of the county court, it has jurisdiction of issues on distress warrants where the amount of the principal does not exceed one hundred dollars, and at its quarterly session it has jurisdiction of such issues on distress warrants where the amount exceeds one hundred

not more than three hundred dollars, except where the warrant is issued by the notary judge himself. Therefore where notary public or justice of the peace issued a distress warrant for two hundred and thirty-five dollars, returnable to the next term of the county court, it was properly returned together with the counter writ thereto, to the next quarterly session of the county court. Code, §283 (f), 295; 60 a, 623.

Judgment reversed.

J. A. Hunt; S. J. Hale, for plaintiff in error.

Henry Walker, for defendant.

Day vs. Banks et. al.; Banks et. al. vs. Mills et. al.; Wilkins vs. Mills. Equity, from Chatham. Mortgage. Title. Choses in Action. Merger. Equity. Liens. (Before Judge Adams.)

Hall, J.—1. The assignee of a chose in ac-

on other than promissory notes, bills, of exchange, etc., takes it subject to the equities existing at the time of the transfer, and to such as subsequently arise unless notice be given to the party bound. 2 W. & T. Lead. 215-17, 233, 209.

2. As a general rule, a party cannot hold a lien on his own property; and this is never allowed except where equity intervenes to protect the title and thereby prevent a failure of justice. 94 U. S., 413.

Where the money due on a mortgage is paid by one whose title it is not, the release, in form, it purports to be an assignment; and a subsequent assignment of the mortgage by the party whose title it was to extinguish it, could give no title to the assignee as against the holder of another mortgage, to advance, the lien of which the debtor had not paid at the first encumbrance. *Cush, 55; 12 Id., 227.*

See, also, *Notice to the second assignee was unnecessary. Where it otherwise, there were circumstances sufficient to have put him upon inquiry and to have affected his conscience with direct notice. 14 Ga., 145; 10 Vt., 293; Am. Dec., 201.*

The court refused granting a new trial to the defendant, and refusing to complainants in the original bill a decree of foreclosure upon the mortgage premises, was erroneous. The decree

be modified to this extent: Mills should be the right to redeem the premises as to complainants' mortgage, and to proceed to foreclose, assign, or sell the same for the amount of this debt; but for any other amount Clay may be found indebted to him, and if for which he holds the assignment of the mortgage enforcing the mortgage; as between Mills and Mills, the assignment of the same need not an extinguishment of the debt. The complainants are not entitled to have the mortgage rendered in their favor against Clay, between whom and them there is no privity; and when the complainants claim under their mortgage is satisfied, Wilkins is entitled to have the amount received on this account credited on the personal decree in favor of the complainants against him.

It is held that in all such assignments mortgages are to be foreclosed in equity conferred full powers upon the court by this mode of pro-

than that it had at law; and in addition to
 foreclosure, a personal decree may be
 entered against the mortgagor. Code,
 § 79.
 Judgment reversed.
*George A. Mercer, for plaintiff in error, in
 first case.*
*Lawton & Cunningham; Lester & Ravenel;
 R. R. Richards; G. J. Mills, for defendant.*
*R. R. Richards; Lester & Ravenel, for
 plaintiff in error in second case.*
*George A. Mercer; Lawton & Cunningham,
 for defendants.*
*Lawton & Cunningham, for plaintiff in
 error in third case.*
*George A. Mercer; G. J. Mills; R. R.
 Richards; Lester & Ravenel, for defendant.*
*Stoeltdt vs Fain et al. Equity, from
 Lincoln, Honored. Husband and Wife.*
John, J. Hammond.

Hall, J. — Where a married woman applies for a homestead, it must affirmatively appear from her petition that it is claimed out of her husband's property; otherwise, the homestead granted to her will be invalid; and if the husband were the applicant, the homestead would be in that case that of the husband. 61 Ga. 105; 65 Id., 347; 67 Id., 669.

§ 2. A married woman cannot have a homestead set apart out of her own property unless she is living separately and apart from her husband. Code, §2019; 62 Ga., 352.

§ 3. A homestead cannot be affirmed against a married woman and her husband.

Collier & Collier, for plaintiffs in error.

W. L. Calhoun, for defendants.

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Peapstead vs. Frank et al. Appeal, from Fulton. Interest and Usury. Statute of Limitations. (Before Judge Hammond.)

at usurious interest, and various payments were made without direction as to how they should be appropriated and under express contract to keep down interest or satisfy the usury charged, there was no refusal to charge, to the effect that the plaintiff was not to pay more than the usury, and that as more than six months had elapsed since this defence was set up, a claim that the note was usurious was barred by the statute of limitations. The statute of limitations applied to defeat this defence alone relied upon to suits brought to recover on notes which bore plain, or to a claim, saying such a demand. Code, §§ 434, 435, 1935 57 Id. 438; 54 Id. 190; 64 Id. 61 Id. 538.

a. The suit in this case was on notes made after original notes, which the plaintiff claimed were given for the balance due

landlord insisted that the original debt with all interest had been paid, and that these sales were without consideration. The court judgment affirmed.

Hilley & Brother, for plaintiff in error.
Marshall J. Clarke, for defendant.

Perkins & Co. vs. Beck. Complaint for land, return fulfilled. Title. Landlord and tenant. Admissions. Deeds. (Before Judge Hammond.)

Landlord, J.—1. Where a vendor sold land and gave a bond for title, and his vendee paid the purchase money and went into possession of the premises, or by his tenant, and the same adversely, he takes by estoppel, and the same, and one who subsequently bought from the same vendor and took a deed to the property, acquired no title as against him.

A tenant cannot dispute or deny his land-

title, nor can he return to any other title. Therefore the fact that the leasehold was not affected by the fact that the tenant represented to the second vendee that he was the tenant of the vendor, and after the sale to the second vendee agreed to return to the first vendee, is immaterial. The court's judgment affirmed.

J. H. Howard, for plaintiffs in error.
Thomas Findley, by brief, for defendant.

See vs. Markham. Equity, from Fulton. Landlord and Tenant Injunction. Equitable. (Before Judge Hammond)

Landlord, J.—A court of equity will not interfere with the remedies provided for in the Code to collect the rents due from the premises from delinquent tenants, as contained in sections 4077 to 4081 of the Code, except in extraordinary cases, to prevent waste and irreparable injury or damage.

In a case is not presented here. 42 Ga., judgment affirmed.

Dayton & Gresham; F. J. M. Daly; Hawkins & Hawkins, for plaintiff in error.

Abbott & Gray; E. N. Broyles, for defendant.

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Georgia Chemical and Mining Co. vs. Collier et al.—Dequarry to bill for injunction, from Fulton. Nuisance. Damages. Disjunction. Error. (Before Judge Hammond.)

Grandford, J.—If a nuisance causes special damage to an individual in which the public does not participate, such special damage gives rise to an action; and as an action may be brought to enjoin the nuisance continues, until abated, a multiplicity of suits is inevitable, and it is the duty of the court to exercise jurisdiction, so as to do full and complete justice between the parties and to terminate the litigation. 18 Ga., 628.

Collier et al. vs. De Vaughn, (present term).

ndgment affi. med.
 Julius L. Brown; Abbott & Gray, for
 plaintiff in error.
 Chandler & Thomson; B. H. Hill, for
 defendant.

Johnson et al. vs. Burge. Complaint for
 land, from Fulton. Levy and Sale. Title
 execution. (Before Judge Hammond).
 Sanford, J.—A sheriff's deed based on
 justice court f. fa. upon which there was

erty of "no personal property to be found" and conveyed no title. Code, §4172 (b); and finally, §§22 and 22d of the Code. The officer making the levy upon realty and make the entry of no personally pro pte, provided he was still in the county, but in the absence of any effort to have done, the sheriff's deed was properly void.

The judgment affirmed.

Miller & Collier, for plaintiff in error.
Rendall & Thomson, for defendant.

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Attorney of the minor heirs of G. W. CARTER, deceased.

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